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Nos. 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

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JAMES H. McKENNE

JAMES G. TINSLEY, APPELLANT,
vs.
MORGAN TREAT, UNITED STATES MARSHAL, ET AL.

WM. DEC. KESSLER, APPELLANT,
vs.
MORGAN TREAT, UNITED STATES MARSHAL, ET AL.

SAMUEL T. MORGAN, APPELLANT,
vs.
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AUSTIN B. CARPENTER, APPELLANT,
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ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

BRIEF FOR THE UNITED STATES.

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ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

BRIEF FOR THE UNITED STATES.

STATEMENT.

These are habeas corpus proceedings instituted in the Circuit Court of the United States, Eastern District of Virginia, to test the validity of warrants

granted by the United States district judge under section 1014, Revised Statutes, directing removal of appellants from Richmond, where they were arrested, to the Middle District of Tennessee, where they had been indicted by a Federal grand jury for criminal conspiracy in restraint of trade.

In the main all the cases are alike, and, following the brief for appellants, they will be treated herein as one. The record in the case of James G. Tinsley will be referred to.

In May, 1906, a grand jury in the United States Circuit Court for the Middle District of Tennessee returned an indictment against appellants and many other individuals and corporations charging them with violating within that district the act of Congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," by engaging in a conspiracy in restraint of interstate trade in fertilizers, by engaging in a conspiracy whereby such trade was restrained, and also with violating section 5440, Revised Statutes, by conspiring to commit an offense against the United States, to wit, the offense of engaging in a combination in restraint of such trade.

July 10, 1906, the Government presented to United States District Judge Waddill a copy of the indictment, together with a complaint of Marshal Treat, alleging that he believed James G. Tinsley stood indicted by the grand jury for the Middle District of Tennessee for violating the act of Con-

gress to protect trade and commerce against unlawful restraints and monopolies, etc.

Thereupon the judge issued a warrant for the accused, and he was brought in to be dealt with according to law.

Identity was admitted and an authenticated copy of the indictment presented. The Government then asked a warrant directing removal.

> (R. 120.) Thereupon the defendant, J. G. Tinsley, offered himself as witness in his own behalf, and being about to be sworn, the United States, by its counsel, thereupon objected to the witness being sworn or to any testimony being given in rebuttal of the indictment in these proceedings, on the ground that the identity of the defendant being admitted, inasmuch as the indictment on its face charges offenses against the United States committed and triable in the jurisdiction in which the defendant stands indicted, no evidence is admissible here to impeach the indictment, and the order of commitment should be made without other proof.
>
> The defendant's counsel thereupon offered to prove by the defendant and other witnesses then and there present that the Circuit Court for the Middle District of Tennessee had no jurisdiction over the person of said defendant touching the offenses charged in said indictment, in that defendant and said other witnesses would, if permitted, testify that defendant is, and has been for many years, a resident and citizen of the city of Richmond,

> State of Virginia, and that defendant never at any time, or at any place in the State of Tennessee, at the times charged in the indictment, did, or performed, or was party to, or engaged in any act or thing in the said indictment charged as having been done and performed in any way whatsoever by this defendant in the said State of Tennessee; nor has defendant done, or performed, or been engaged in, or a party to the same, or any of them, in any other place or places, at any other time or times whatsoever.

After argument the court ruled that in a proceeding for arrest and removal under section 1014, Revised Statutes, before a United States judge sitting in Virginia, where the right of a preliminary examination on a criminal charge no longer exists prior to trial upon the merits, upon the Government's presentation of a sufficient indictment regularly found by a grand jury in a court of the United States properly charging commission of an offense within the district where found, coupled with proof of identity, it is his duty to bail the accused for appearance before the court where indicted or cause him to be removed thereto. He accordingly decided the testimony offered was inadmissible and directed that the accused either give bail or be held for removal.

Defendant declined to give bond, a warrant directing removal was issued, and he remained in custody pending its execution.

It should be especially noted that no objection was offered to the validity of the indictment at any time during the proceedings before the district judge.

July 11, 1906, application was made to the Circuit Court for habeas corpus and a writ of certiorari to bring up the proceedings before the district judge. Both were granted and due returns made.

The petition alleges that Tinsley is unlawfully imprisoned and restrained of his liberty by the marshal under color of authority of the United States by virtue of a warrant for removal claimed to have been issued under section 1014, Revised Statutes. It details the steps taken before and action by the district judge as to the arrest, rulings and orders made during the hearing before him and the warrant of removal.

The petitioner then charges that under and by virtue of clause 3, section 2, article 3, Constitution of the United States, and of the sixth amendment, he was entitled to be tried and could only be tried for any alleged offense against the United States in the State and district where the offenses charged in the indictment were committed; that the offenses specified in the indictment were not committed in the Middle District of Tennessee; that none of the acts mentioned and supposed to have been engaged in by the petitioner were done within that district; and that in case he should be removed for trial under the indictment and there held he would not be tried within the district in which the offenses

charged were committed, as required by the Constitution; and further, that the indictment states no offense is insufficient and void.

It further alleges that the imprisonment and detention are without authority of law, the proceedings before the district judge illegal, and the warrant of removal in violation of article 3, section 2, of the Constitution, and the sixth amendment; that the rulings of the district judge in the exclusion of the evidence offered by petitioner and in holding the certified indictment conclusive, and in refusing to permit introduction of any evidence in behalf of petitioner, deprived him of rights secured by the Constitution and by section 1014, Revised Statutes; and that he is deprived of his liberty without due process of law.

At the hearing before the Circuit Court an offer was made to prove by witnesses the facts set forth in the petition. The court held the testimony immaterial; that the indictment properly alleged a conspiracy for the commission of which personal presence was not necessary in the Middle District of Tennessee; that the action of the district judge was correct; and dismissed the writ.

Appeal was taken directly to this court.

SEC. 1014, Revised Statutes:

> For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first

judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had.

ARGUMENT.

I.

The court is without jurisdiction and the appeal should be dismissed.

Judiciary act March 3, 1891 (26 Stat., 827):

> SEC. 5. That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:
>
> In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.

From the final sentences and decrees in prize causes.

In cases of conviction of a capital crime.

In any case that involves the construction or application of the Constitution of the United States.

In any case in which the constitutionality of any law of the United States, or the validity of construction of any treaty made under its authority, is drawn in question.

In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States.

Nothing in this act shall affect the jurisdiction of the Supreme Court in cases appealed from the highest court of a State nor the construction of the statute providing for review of such cases.

Appeals from decrees of circuit courts in habeas corpus proceedings can not be taken directly to this court unless they come within one of the clauses of section 5.

Lau Ow Bew v. *United States*, 144 U. S., 47, 58.

Cross v. *Burke*, 146 U. S., 82, 88.

In re Lennon, 150 U. S., 393, 399.

The only ground upon which an argument can be bottomed to sustain the present appeal is that the "case involves the construction or application of the Constitution of the United States," within the meaning of those terms in section 5; and in order for that paragraph to apply there must be a real, sub-

stantial dispute or controversy as to such construction or application.

Carey v. *Houston and Texas Central Ry.*, 150 U. S., 181.

Western Union Telegraph Co. v. *Ann Arbor Railroad Company*, 178 U. S., 243.

American Sugar Refining Co. v. *New Orleans*, 181 U. S., 281.

A mere allegation that some constitutional question is involved does not suffice to give jurisdiction when it appears from the whole record that such a point is not really and substantially in controversy.

No real substantial dispute or contention concerning the construction or application of any part of the Constitution exists. The proceedings were under section 1014, Revised Statutes, and the thing in issue was the proper construction of that section, which is the foundation of whatever rights the petitioner had. The Government contended that under it a sufficient indictment with proof or admission of identity made out a conclusive case and rendered it obligatory upon the judge to direct removal. This view prevailed. Petitioners claimed that under it they had the right to introduce proof in contradiction of the indictment. Manifestly the issue was upon the construction of the section. (*Beavers* v. *Haubert*, 198 U. S., 77, 85.)

If instead of section 1014 Congress had enacted in express words what the district judge held the law to be, a removal thereunder would not have been a

violation of any constitutional provision. It follows, even if it be admitted that the judge misconstrued the statute, no constitutional guaranty was infringed.

Rawlins v. *Georgia*, 201 U. S., 638.
In re Moran, decided November 5, 1906.

It seems obvious that Congress might provide by statute for a bench warrant which should run thruout the Union, and that one arrested thereunder in Virginia might be carried at once to Tennessee for trial without violation of constitutional rights. Removal under the judgment of the court in the case under consideration would no more infringe appellant's rights than would removal under a bench warrant of the character suggested.

Constitutional suggestions without merit or where the point has been conclusively settled by this court do not suffice to give jurisdiction under section 5, act 1891.

II.

If the district judge improvidently issued the warrant for removal his action was mere error, not reviewable in a habeas corpus proceeding.

No review of the action of a judge in proceedings under section 1014 has been provided. His judgment is final.

A writ of habeas corpus can not be used to perform the functions of a writ of error or appeal.

Benson v. *McMahon*, 127 U. S., 457.
Ornelas v. *Ruiz*, 161 U. S., 502.
Bryant v. *United States*, 167 U. S., 105.
Terlinden v. *Ames*, 184 U. S., 270.
Riggins v. *United States*, 199 U. S., 548.
Felts v. *Murphy*, 201 U. S., 123, 129.

Where one in custody under judgment of a court resorts to habeas corpus two questions are open for consideration: Did the court which rendered judgment or made the order of imprisonment have jurisdiction of the subject-matter and of the person? And did the court exceed its jurisdiction?

Ex parte Lange, 18 Wall., 163.
Ex parte Parks, 93 U. S., 18, 23.
Ex parte Siebold, 100 U. S., 371, 375.
Hans Nielsen, petitioner, 131 U. S., 176.
Horner v. *United States*, 143 U. S., 577.
Greene v. *Henkel*, 183 U. S., 249, 261.
Felts v. *Murphy*, 201 U. S., 123.
Ex parte Moran, 144 Fed., 594, 604.

The district judge had jurisdiction of the parties and of the subject-matter and authority to direct removal. It was his duty to issue the warrant under proper conditions submitted for his determination—if the indictment appeared sufficient, if identity was established, and if there was probable cause for holding the party to answer.

The petitioners claim that he erred in holding the indictment sufficient and should have heard the excluded evidence and then acted.

The judge considered the validity of the indictment and sustained it. If wrongful, his action was error and does not go to the jurisdiction.

"If an inferior court or magistrate of the United States has jurisdiction, a superior court of the United States will not interfere by habeas corpus." (*Horner* v. *United States*, 143 U. S., 577.)

This court decided in *Beavers* v. *Henkel* (194 U. S., 73, 82) that a valid indictment, with proof or admission of identity, establishes probable cause sufficient to justify a warrant of removal. Such proof was before the district judge.

In *Hyde* v. *Shine* (199 U. S., 83, 84) it was declared well settled that upon habeas corpus the court will not weigh the evidence.

The trial court had a right to hear and determine. There was some evidence to support the claim of the Government, and it had power under the statute to issue a warrant. If the evidence offered by defendant was wrongfully rejected such action was mere error, in no way affects the question of jurisdiction, and is not subject to review upon habeas corpus.

III.

The action of the court below was correct.

In Virginia one indicted for crime is not entitled to a preliminary examination before being put on trial. (Virginia Code Annotated (Pollard), 1904, section 4003 and note; section 4012; *Jones's case*, 86 Va., 661.)

Before the district judge no question was raised as

to sufficiency of the indictment. After examination it was held valid by both judges below, and in view of their conclusion can not be said to be obviously bad. In the present proceeding neither this nor the trial court should inquire with great particularity as to technicalities. Such points should be considered and the legal sufficiency of the indictment determined only by the court in which it was found. (*Benson* v. *Henkel*, 198 U. S., 1, 10.)

The highly refined objections to the indictment urged in the brief for appellants were not proper matter for the nice consideration of the district judge, not because he was lacking in ability therefor, but because in the orderly way they should be decided by the trial court. And no court on habeas corpus can be required to pass upon them in advance of a trial in the court of the indictment. (*Horner* v. *United States*, 143 U. S., 577; *Riggins* v. *United States*, 199 U. S., 547.) Moreover, both judges below have adjudged against appellants' contentions—have held the indictment sufficient—and whether right or wrong that action can not be reviewed on habeas corpus.

Identity was admitted and no extraordinary facts suggested to indicate bad faith or any peculiar hardships which would result from removal, and the examining judge decided it was his duty to direct the same.

"Removal proceedings are but process for arrest—means of bringing a defendant to trial." (*Beavers* v. *Haubert*, 198 U. S., 77, 87.) The provisions prescribing how the same shall be instituted and conducted

are in section 1014, Revised Statutes, and the regularity of any arrest must be tested thereby. They originated in section 33, judiciary act 1789 (1 Stat., 91), which follows:

> That for any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any justice of the peace, or other magistrate of any of the United States where he may be found agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested, and imprisoned or bailed, as the case may be, for trial before such court of the United States as by this act has cognizance of the offense. (*b*) And copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses, for their appearance to testify in the case; which recognizances the magistrate before whom the examination shall be may require on pain of imprisonment. And if such commitment of the offender or the witnesses shall be in a district other than that in which the offense is to be tried, it shall be the duty of the judge of that district where the delinquent is imprisoned seasonably to issue, and of the marshal of the same district to execute, a warrant for the removal of the offender, and the witnesses, or either of them, as the case may be, to the district in which the trial is to be had. And upon all arrests in criminal cases bail shall be admitted, except where the punishment may be death, in which cases it shall not

> be admitted but by the supreme or a circuit court, or by a justice of the Supreme Court, or a judge of a district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offense, and of the evidence and the usages of law. And if a person committed by a justice of the supreme or a judge of a district court for an offense not punishable with death shall afterwards procure bail, and there be no judge of the United States in the district to take the same, it may be taken by any judge of the supreme or superior court of law of such State.

By act March 2, 1793 (c. 22, sec. 4; 1 Stat., 334), and act August 23, 1842 (c. 188, sec. 1; 5 Stats., 516), other individuals were authorized to arrest, imprison, and bail. The authority granted by section 33, act 1799, to require recognizances of witnesses is now found in section 879, Revised Statutes.

The first part of section 1014 provides for the arrest of any offender against the United States wherever found and without reference to whether he has been indicted. It is applicable to one within or without the district where the offense was committed and includes every criminal charge. Congress intended to adopt the usual mode of proceeding prescribed by the State, whatever that might be. The proceedings for arrest and commitment in any State are the same whether the crime was committed within or without that State; but when trial must take place without the district of arrest then, after

the offender has been committed, it becomes the duty of the district judge to issue a warrant of removal.

One charged with an offense against the United States must be arrested and committed as tho similarly charged with crime against the State. The duties of the Federal judge in reference to removal begin after the accused has been committed and the language of the statute seems to make it obligatory upon him to direct a removal upon application. It certainly does not in terms require him to hear proof and conduct an inquiry as to guilt or innocence. The removal of witnesses and offenders is put on the same basis. No doubt the Federal judge should inquire into the regularity of arrest and commitment and see that they harmonize with the law of the State; and in extraordinary cases possibly he might go further. But generally if he finds the proceedings entirely regular he should, without more, issue the warrant. At the most he has a certain discretion, to be sparingly exercised to prevent wrong, and not to be interfered with unless in case of manifest abuse.

Something concerning what Congress intended should be submitted to the determination of officers empowered to act under section 1014 may be inferred from the official station of the lowest of them. A justice of the peace as to arrest and commitment is given the same jurisdiction as any United States judge. It seems quite impossible to believe that there was a purpose to give jurisdiction to this petty officer to determine without right of appeal all

such perplexing questions as those discust in the brief for appellants. The object of section 1014 was to afford an expeditious mode for arresting and bringing one accused to trial under the ordinary safeguards prescribed by State law; and the questions preliminary to arrest and commitment were understood to be within the ability of a justice of the peace to decide.

In *Greene* v. *Henkel* (183 U. S., 249, 261) Mr. Justice Peckham, speaking for the court, said:

> We do not think that under this statute [sec. 1014] the commissioner would be warranted in taking evidence in regard to the organization of the grand jury which found the indictment, as claimed by the defendants. The indictment is valid on its face; purports to have been found by a grand jury acting in fact as such at a regular term of a district court of the United States, presided over by one of its judges and hearing testimony in the ordinary way. In our opinion such an indictment is *prima facie* good, and when a copy of it is certified by the proper officer, a magistrate, acting pursuant to section 1014 of the Revised Statutes, is justified in treating the instrument as an indictment found by a competent grand jury and is not compelled or authorized to go into evidence which may show or tend to show violations of the United States statutes in the drawing of the jurors composing the grand jury which found the indictment.

I submit that there is no stronger reason for compelling the committing magistrate to go into evidence contradicting the allegations of the indictment than into questions relating to organization of the grand jury. If the grand jury was improperly formed an indictment is bad; and if bad, what reason would compel a defendant to go to a distant State and answer which would not necessitate the same course where its allegations were probably untrue?

In *Beavers* v. *Henkel* (194 U. S., 73, 84) the court, speaking by Mr. Justice Brewer, said:

> The thought is that no one shall be subjected to the burden and expense of a trial until there has been a prior inquiry and adjudication by a responsible tribunal that there is probable cause to believe him guilty. But the Constitution does not require two such inquiries and adjudications. The Government, having once satisfied the provision for an inquiry and obtained an adjudication by the proper tribunal of the existence of probable cause, ought to be able without further litigation concerning that fact to bring the party charged into court for trial. The existence of probable cause is not made more certain by two inquiries and two indictments. Within the spirit of the rule of giving full effect to the records and judicial proceedings of other courts, an indictment found by the proper grand jury should be accepted everywhere through the United States as at least prima facie evidence of the existence of probable cause. And the place where such inquiry must be had and

the decision of a grand jury obtained is the locality in which by the Constitution and laws the final trial must be had.

In *Benson* v. *Henkel* (198 U. S., 1, 10) Mr. Justice Brown, speaking for the court, said:

> The extent to which a commissioner in extradition may inquire into the validity of an indictment put in evidence before him as proof of probable cause of guilt has never been definitely settled, although we have had frequent occasion to hold generally that technical objections should not be considered, and that the legal sufficiency of the indictment is only to be determined by the court in which it is found. * * *
>
> Indeed, it is scarcely seemly for a committing magistrate to examine closely into the validity of an indictment found in a Federal court of another district and subject to be passed upon by such court on demurrer or otherwise. * * *

In *Hyde* v. *Shine* (199 U. S., 62, 84) this court, by Mr. Justice Brown, said:

> In the Federal courts, however, it is well settled that upon habeas corpus the court will not weigh the evidence, although if there is an entire lack of evidence to support the accusation the court may order his discharge. In this case, however, the production of the indictment made at least a *prima facie* case against the accused, and if the commissioner received evidence on his behalf it was for him to say whether upon the whole testimony there was proof of probable cause [*In re Oteiza,*

136 U. S., 330; *Bryant* v. *United States*, 167 U. S., 104.]

Benson v. *McMahon*, 127 U. S., 457.

Ornelaz v. *Ruiz*, 161 U. S., 502, 508.

In re Belknap, 96 Fed., 614.

Indictment by the grand jury in Tennessee after investigation was an adjudication of probable cause to believe petitioners guilty. The Constitution does not require two such inquiries before an offender can be put upon trial, and there is nothing in section 1014 necessitating a second investigation of matters already solemnly determined. If an offender is arrested in the district where the indictment was found he can not, unless provided for by the law of the State, claim an examination before trial, and no reason appears why different treatment should be absolutely necessary as to one apprehended just outside that territory. Certainly their constitutional rights are the same, and if a preliminary hearing can be demanded by one it is difficult to see how it can be denied the other. The reasoning advanced in the brief for appellants would require determination of the *validity* of all indictments and the guilt of all offenders whenever asked for in advance of trial.

The questions now raised as to place of trial upon a charge of conspiracy were before the court in *Hyde* v. *Shine* and were ruled against the contention of appellants. The court said (p. 76): "As the indictment in this case charges that the conspiracy was entered into in the city of Washington it becomes unnecessary to consider whether an indictment will lie within the jurisdiction where the overt act was committed, etc."

Habeas corpus proceedings test the validity of confinement—not its justness, and in them proof of guilt or innocence is immaterial. If the trial court had jurisdiction and kept within it no relief can be given. Upon application for warrant of removal a district judge cannot try the accused as upon a plea of not guilty as, in effect, was asked below.

IV.

The Indictment was sufficient, and no injury was done petitioners by excluding the evidence they offered.

The indictment sufficient.

There are six counts. Two are based upon section 5440, Revised Statutes, and charge a conspiracy in the Middle District of Tennessee to commit an offense by engaging in a combination in restraint of trade and commerce among the several States in violation of the act of July 2, 1890.

Four counts charge violations of the act of July 2, 1890. In varying language they allege:

That 31 corporations, 2 firms, and 24 individuals, residents of the Middle District of Tennessee and of other districts and States, in the said Middle District of Tennessee and in violation of section 1, act July 2, 1890, unlawfully did knowingly engage in a conspiracy in restraint of trade between the States, and many overt acts alleged to have been done in pursuance of the conspiracy in the Middle District of Tennessee and elsewhere are set out. It is alleged that the corporations and firms specified were

engaged in interstate commerce as manufacturers of and dealers in fertilizers in the States of North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Arkansas, and Tennessee; that together they controlled in those States 90 per cent of the business in such commodity; that before the conspiracy they were engaged in interstate commerce in active competition with each other; that for the purpose of preventing and destroying such competition and to enable them to fix and maintain uniform and noncompetitive prices they unlawfully engaged in a conspiracy; that by agreement the prices for and amount of fertilizer which should be sold by each in the States specified during any year were fixt, and if more was sold by any one he was required to pay for each excessive ton at least $1, if less he was to receive from his co-conspirators for each deficient ton a like sum; that as a means for carrying out the purposes of the conspiracy a corporation called the Colonial Development Company (Limited) was organized under the laws of Canada, and its stock prorated among the conspirators; that to insure maintenance of prices each conspiring corporation was required to pay to the Canadian corporation 20 cents per ton upon the amount which by allotment it was permitted to sell; if agreed prices were maintained this amount was returned at the end of the season, otherwise it might not be, and thru this corporation also collections

were made for excess sales and payments for deficiencies; that in pursuance of the general plan outlined the defendant corporations, firms, officers, and agents conducted their fertilizer business in the States named, greatly advanced former prices, ceased to compete with each other, and secured for themselves enormous profits at the expense of purchasers.

Act July 2, 1890 (26 Stats., 209):

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

The indictment alleges a conspiracy deliberately engaged in by competitors in the Middle District of Tennessee and in destruction of competition in interstate commerce. That such a conspiracy is unlawful and in violation of the Sherman antitrust law seems clear.

Addystone Pipe &c. Co. v. *United States*, 175 U. S., 211.

Montague v. *Lowry*, 193 U. S., 38.

Northern Securities Co. v. *United States*, 193 U. S., 197.

Swift & Co. v. *United States*, 196 U. S., 375.

A habeas corpus proceeding is not the proper way to test the validity of indictments upon technical points. The trial court is the place for all such matters. (*Riggins* v. *United States*, 199 U. S., 547–551.)

In reply to the argument that the facts specified in the indictment show only a combination whereas it alleges conspiracy, properly defined to be a combination of two or more persons to accomplish an unlawful end by lawful means or a lawful end by unlawful means, it seems only necessary to refer to section 1035, Revised Statutes, which provides that "in all criminal causes the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment." One indicted for murder could hardly hope to escape trial by showing that he was guilty of manslaughter.

The indictment charges a conspiracy engaged in within the Middle District of Tennessee and that for the purposes of removal is sufficient and precludes inquiry concerning the facts relating to the actual place where it was first entered into. (*Hyde* v. *Shine*, 199 U. S., 76.) The authorities holding that prosecution for a conspiracy may take place, either where it was formed or where an overt act was committed, are too overwhelming to permit any court to hold the contrary in a removal proceeding.

The contention that the crime of conspiracy is complete when the combination is entered into and that no overt act renews or continues it was put forward in *Lorenz* v. *United States* (24 App. Cases D. C., 337, 386) and overruled. This court denied an application for certiorari (196 U. S., 640).

No injury resulted.

Identity having been admitted one question of fact remained for consideration—Whether there was probable cause to believe the accused guilty of the crime charged. The district judge was the tribunal to decide and if any legal evidence supported his conclusion was final—not reviewable in any way. (*Greene* v. *Henkel*, 183 U. S., 261.)

The indictment was presented; it was legal evidence and made out a prima facie case. (*Beavers* v. *Henkel*, 194 U. S., 85.) The judge decided in effect that the evidence offered by petitioners was immaterial—that if introduced it would not affect his decision. Having proof of probable cause sufficiently strong to satisfy him notwithstanding all the evidence offered he declared his conclusion at once, and petitioner is in no worse condition than if the judge had listened for thirty days and then directed the warrant. On abundant evidence probable cause was found. What was offered in opposition would not have affected the conclusion, and no valid complaint can be made because of the refusal to go thru the idle ceremony of listening to it.

In a removal proceeding the cause should not be tried as on a plea of not guilty—not even if the defense is an alibi. The mass of proof offered and rejected was appropriate only for a trial court. The highly interesting questions discust in the brief for appellants can not, by suing out habeas corpus, be brought before this court and a decision obtained in advance of a trial. (*Riggins* v. *United States*, 199 U. S., 547.)

Crimes are triable where committed, not where the offender happened to be in person on the day of the transgression. (*Burton* v. *United States*, 202 U. S., 344.) And it is well settled that upon a charge of conspiracy all the conspirators may be tried in the jurisdiction where anyone does an overt act.

"Although technically the place where the conspiracy is entered into is the place of venue, yet it is generally held that the venue may be laid as to any or all of the conspirators in the county in which an act was done by any of them in furtherance of the criminal design, and consequently in this county all the coconspirators are indictable." (*Wharton's Criminal Law*, section 1397.)

Wharton's Conflict of Laws(Parmele), vol. 2, ch. 13, p. 1603.

Bishop's Criminal Procedure, secs. 61, 236.

6 Am. and Eng. Enc. of Law (2d ed.), 844.

Brown on Jurisdiction, sec. 82, p. 328.

Beale's Crim. Pl. and Prac., sec. 5.

Archbold's Crim. Pl. and Prac. (Waterman's ed.), pp. 246 and 1052.

Hyde v. *Shine*, 199 U. S., 62, 76.
Rex v. *Brissac*, 4 East., 164.
Commonwealth v. *Westervelt*, 11 Phila. (Pa.), 461.
Commonwealth v. *Corlies*, 3 Brewst. (Pa.), 575.
Commonwealth v. *Gillespie*, 7 Sergt. and Rawle (Pa.), 469.
People v. *Arnold*, 46 Mich., 275.
People v. *Mather*, 4 Went. (N. Y.), 259.
United States v. *Rindskopf*, 6 Biss., 259.
United States v. *Newton*, 52 Fed., 275.

I respectfully ask that the appeals be dismissed or the judgment of the court below be affirmed.

J. C. McReynolds,
Assistant Attorney-General.

November, 1906.

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